

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

DAVID V. GALLERON and DARLEEN  
GALLERON, )  
Plaintiffs,  
v.  
MANN MORTGAGE, LLC, et al., )  
Defendants. )

3:11-cv-730-RCJ-WGC

15 This is a foreclosure-avoidance suit brought by plaintiffs David and Darleen Galleron.  
16 The plaintiffs' complaint listed nine causes of action. The Court previously granted in part  
17 CitiMortgage, Inc.'s motion to dismiss (#9) as to claims (1), (2), (3), (4), (7), (8), and (9) and  
18 denied in part the motion to dismiss claims (5), violation of NRS § 107.080, and (6), quiet title.  
19 (Order (#20)). Currently before the Court is CitiMortgage, Inc.'s motion for summary judgment  
20 (#21) on claims (5) and (6), which Cal-Western Reconveyance Corporation later joined.  
21 (Joinder (#22)). For the reasons stated below, the motion for summary judgment (#21) is  
22 DENIED.

## BACKGROUND

24 Plaintiffs David V. Galleron and Darleen Galleron (collectively “Plaintiffs”) executed a  
25 note secured by a deed of trust on a piece of property located at 11500 Campo Rico Lane,  
26 Sparks, Nevada, which was recorded in Washoe County on January 25, 2008. (Deed of Trust  
27 (#21-1) at 2-3, 5). The mortgage, dated January 23, 2008, was for \$580,000.00. (*Id.* at 3). The  
28 lender on the deed of trust was Mann Mortgage, LLC. (*Id.*). The trustee on the deed of trust  
was Stewart Title of Nevada. (*Id.*). Mortgage Electronic Registration Systems, Inc. (“MERS”)

1 was named as "a nominee for the Lender and Lender's successors and assigns" and claimed  
 2 to be the beneficiary<sup>1</sup> under the security instrument. (*Id.*).

3 On June 28, 2011, MERS, as nominee for Mann Mortgage, executed an assignment  
 4 of mortgage and transferred the mortgage to CitiMortgage, Inc. ("CMI"). (Assignment of  
 5 Mortgage (#21-2) at 2-3).

6 On July 13, 2011, CMI executed and notarized a substitution of trustee that replaced  
 7 Cal-Western Reconveyance Corporation (known herein as either "Cal-Western" or collectively  
 8 with CMI as "Defendants") as the trustee for Stewart Title of Nevada. (Substitution of Trustee  
 9 (#21-3) at 2-3).

10 On August 26, 2011, Todd Brachtenbach of First American Title ("First American")  
 11 executed and recorded a notice of default and election to sell with the Washoe County  
 12 Recorder's office. (Notice of Default (#21-5) at 7-8). The notice of default named Cal-Western  
 13 as the substituted trustee and claimed that First American was acting as agent of Cal-  
 14 Western. (*Id.*). The notice of default identified the breach of obligations as "[f]ailure to pay the  
 15 monthly payment due March 1, 2011 of principal and interest and subsequent installments due  
 16 thereafter; plus late charges; together with all subsequent sums advanced by beneficiary  
 17 pursuant to the terms and conditions of said deed of trust." (*Id.* at 7).

18 In October 2011, CMI filed a petition for removal and attached Plaintiffs' 51-page  
 19 complaint from the Second Judicial District. (Pet. for Removal (#1); Compl. (#1-2)). On  
 20 October 26, 2011, CMI filed a motion to dismiss for failure to state a claim, later joined by Cal-  
 21 Western, and on May 11, 2012 the Court dismissed claims (1), (2), (3), (4), (7), (8) and (9).  
 22 (Mot. to Dismiss (#9); Joinder (#11); Order (#20)). Claim (5) for violation of NRS § 107.080  
 23 and claim (6) for quiet title were retained because Defendants did not provide the Court  
 24 documentation demonstrating that First American had the authority to act as Cal-Western's  
 25 agent and execute the notice of default. (Order (#20) at 5-6).

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27           <sup>1</sup> Despite the wording of the deed of trust, MERS is not a beneficiary to the deed of  
 28 trust. See *Gomez v. Countrywide Bank, FSB*, 2009 WL 3617650, at \*2 (D. Nev. 2009).

CMI filed a motion for summary judgment on May 18, 2012, (Mot. for Summ. J. (#21)), which Cal-Western later joined, (Joinder (#22)). In the motion for summary judgment, CMI provided this Court an affidavit, signed by Lorrie Womack, Assistant Vice President of Cal-Western, which claims that First American is an authorized agent to “record Notices of Default and foreclosure documents in the State of Nevada on behalf of CAL-WESTERN RECONVEYANCE CORPORATION . . . and begin the foreclosure process on the . . . Property and Note.” (Womack Aff. (#21-4) at 2). On June 9, 2012, Plaintiffs filed a response to the motion for summary judgment. (Response (#24)). On June 22, 2012, Defendants filed a reply to Plaintiffs’ response (#24) to summary judgment. (Reply (#27)).

In determining Defendants’ motion for summary judgment (#21), the Court considers Plaintiffs’ claims (5), violation of NRS § 107.080, and (6), quiet title.

## **LEGAL STANDARD**

The purpose of summary judgment is to dispose of factually unsupported claims and defenses. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986). Under the Federal Rules of Civil Procedure, summary judgment is appropriate when “the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). A fact is material when it “might affect the outcome of the suit under the governing law.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A material fact is genuine if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. See *id.*

When presented with a motion for summary judgment, the court employs a burden-shifting analysis. When the moving party would bear the burden of proof at trial, it must present evidence “which would entitle it to a directed verdict if the evidence went uncontested at trial.” *C.A.R. Transp. Brokerage Co. v. Darden Rests., Inc.*, 213 F.3d 474, 480 (9th Cir. 2000) (citations omitted). In such circumstances, “the moving party has the initial burden of establishing the absence of a genuine issue of fact on each issue material to its case.” *Id.* In contrast, when the nonmoving party bears the burden of proving the claim or defense, the moving party can meet its burden in two ways: (1) by presenting evidence to

1 negate an essential element of the nonmoving party's case; or (2) by demonstrating that the  
 2 nonmoving party failed to make a showing sufficient to establish an element essential to that  
 3 party's case on which that party will bear the burden of proof at trial. See *Celotex Corp.*, 477  
 4 U.S. at 323-24. If the moving party fails to meet its initial burden, summary judgment must be  
 5 denied and the court need not consider the nonmoving party's evidence. See *Adickes v. S.H.*  
 6 *Kress & Co.*, 398 U.S. 144, 159-60 (1970).

7 If the moving party meets its initial responsibility, the burden then shifts to the opposing  
 8 party to establish that a genuine issue as to any material fact actually does exist. See  
 9 *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). To establish the  
 10 existence of a factual dispute, the opposing party need not establish a material issue of fact  
 11 conclusively in its favor. It is sufficient that "the claimed factual dispute be shown to require  
 12 a jury or judge to resolve the parties' differing versions of the truth at trial." *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987) (citations omitted).  
 13 In other words, the nonmoving party cannot avoid summary judgment by relying solely on  
 14 conclusory allegations that are unsupported by factual data. See *Taylor v. List*, 880 F.2d 1040,  
 15 1045 (9th Cir. 1989). Instead, the opposition must go beyond the assertions and allegations  
 16 of the pleadings and set forth specific facts by producing competent evidence that shows a  
 17 genuine issue for trial. See Fed. R. Civ. P. 56(e); see also *Celotex Corp.*, 477 U.S. at 324.  
 18 When considering a summary judgment motion, a court may examine "materials in the record,  
 19 including depositions, documents, electronically stored information, affidavits or declarations,  
 20 stipulations (including those made for purposes of the motion only), admissions, interrogatory  
 21 answers, or other materials." Fed. R. Civ. P. 56(c)(1)(A).

22 At summary judgment, the judge's function is not to weigh the evidence and determine  
 23 the truth but to determine whether there is a genuine issue for trial. See *Anderson*, 477 U.S.  
 24 at 249. The evidence of the nonmovant is "to be believed, and all justifiable inferences are to  
 25 be drawn in his favor." *Id.* at 255. But, if the evidence of the nonmoving party is merely  
 26 colorable or is not significantly probative, summary judgment may be granted. See *id.* at 249-  
 27 50.

DISCUSSION

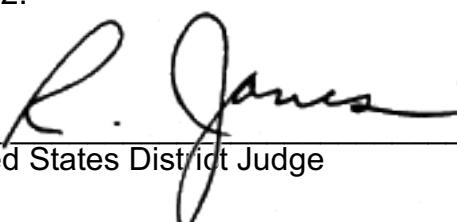
To demonstrate that First American had the authority to act as Cal-Western's agent and execute the notice of default, Defendants have presented an affidavit, signed by Lorrie Womack, Assistant Vice President of Cal-Western, in which she claims that First American is an agent of Cal-Western. (Womack Aff. (#21-4) at 2). No documentation has been provided establishing this agency relationship and Defendants solely rely on this affidavit to establish First American's authority.

The Womack affidavit alone is insufficient to establish that First American had authority to execute the notice of default. The Womack affidavit fails to provide any details regarding the alleged agency relationship, such as when the relationship started, whether it was nationwide or limited to a specific geographic area, or whether it was written or oral. More importantly, the Womack affidavit fails to sufficiently describe the scope of First American's agency authority. The affidavit merely provides that First American had authority to record notices of default to initiate foreclosure, but nowhere does it provide that First American had the authority to actually execute the notice of default itself. As Defendants have failed to establish that First American had the authority to execute the notice of default, Defendants' motion for summary judgment on claims (5), violation of NRS § 107.080, and (6), quiet title, is denied.

CONCLUSION

For the foregoing reasons, IT IS ORDERED that Defendants' motion for summary judgment (#21) is DENIED.

DATED this 6th day of September, 2012.



R. Jones  
United States District Judge